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APPENDIX TO APPELLANTS' BRIEF

United States Court of Appeals

For the Second Circuit

Docket No. 24685

In the Matter of

The Issuance of a Subpoena to ALFRED K. STERN and MARTHA DODD STERN, citizens of the United States presently residing in Mexico,

Appellants,

against

UNITED STATES OF AMERICA,

Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Statement of Relevant Docket Entries

Date	Proceedings
2/22/57	Filed order for the issuance of subpoena for Martha Dodd Stern, McGohey, J.
2/22/57	Filed order for the issuance of subpoena for Alfred K. Stern, McGohey, J.
3/7/57	Filed Affdvt. and notice of motion to quash subpoenas, Re: Alfred K. Stern and Martha Dodd Stern. Retb. 3/11/57.
3/8/57	Filed copy of order for subpoena. Re: Martha Dodd Stern. Subp. Att. & Post Card Att.

Statement of Relevant Docket Entries

Date	Proceedings
3/ 8/57	Filed copy order for subpoena. Re: Alfred K. Stern Subp. Att. and Post Card Att.
3/11/57	Motions by Alfred K. Stern and Martha Dodd Stern to quash subpoenas argued. Dec. Res. Murphy, J.
3/12/57	Memo endorsed on notice of motion filed 3/7/57. Re: Alfred K and Martha Dodd Stern. Motion denied. Only point raised in discussion has already been adjudicated in this court, etc. No settlement necessary. Murphy, J.
3/14/57	Filed Affdvt. and order to show cause for contempt. Re: Subpoena for Martha Dodd Stern. Retb. 3/26/57.
3/14/57	Filed Affdvt. and order to show cause for contempt. Re: Alfred K. Stern's subpoena. Retb. 3/26/57.
3/22/57	Filed notice appeal. Re: Alfred and Martha Stern and mailed copy to U. S. Attorney on 3/25/57.
3/22/57	Filed notice with an appeal will be taken. Re: Alfred and Martha Dodd Stern.
3/22/57	Filed order for the issuance of subpoena. Re: Alfred K. Stern, McGohey, J.
3/22/57	Filed order for the issuance of subpoena. Re: Martha Dodd Stern.
4/23/57	Filed copy of order. Re: Alfred K. Stern. Filed 3/22/57 and Affdvt. of U. S. Consul, Mexico as to service on Alfred K. Stern, 4/1/57.
4/23/57	Filed copy of order. Re: Martha Dodd Stern.

Statement of Relevant Docket Entries

Date	Proceedings
4/23/57	Filed copy of order. Re: Alfred K. Stern.
4/25/57	Before Levet, J., hearing on show cause to punish Alfred K. and Martha Dodd Stern for contempt—concluded. Decision reserved. Adjourned to 5/1/57 at 2:00 p. m.
4/25/57	Filed special appearance by Paul O'Dwyer, 40 Wall Street as Atty. for Alfred and Martha Dodd Stern.
5/ 1/57	Before Levet, J., application to punish Martha Dodd Stern for contempt—granted, Martha Dodd Stern fined $25,000.00. Application to punish Alfred K. Stern for contempt of court—granted—fined $25,000.00. Settled orders on notice.
5/ 1/57	Filed Affdvt. and notice of motion to vacate order of Murphy, J., Re: Alfred K. and Martha Dodd Stern with memorandum endorsed reverse side. Motion denied. So ordered, Levet, J.
5/ 6/57	Filed order that Martha Dodd Stern be held in contempt of court and fined in sum of $25,000.00, etc. Levet, J.
5/ 7/57	Filed order that Alfred K. Stern be held in contempt of court and fined in sum of $25,000.00, etc. Levet, J.
5/10/57	Filed notice of appeal.

Order for the Issuance of Subpoena

(Record, page 93)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter

of the issuance of a subpoena upon
MARTHA DODD STERN

a citizen of the United States of America,
presently residing in Mexico.

Upon the affidavit of John T. Moran, Jr., Assistant United States Attorney for the Southern District of New York, sworn to the 21st day of February, 1957, it is

ORDERED that a subpoena issue herein commanding Martha Dodd Stern to appear on March 14, 1957, before the January Special Grand Jury for the Southern District of New York, and it is

FURTHER ORDERED that any Consul General or Consul of the United States of America within the Republic of Mexico be and he hereby is directed to serve said subpoena upon said Martha Dodd Stern, and it is

FURTHER ORDERED that the said Consul General or Consul serving said subpoena tender said Martha Dodd Stern $468.00, the amount necessary for her expenses in going from and returning to her place of residence, Mexico City, Mexico and for her attendance at the place at which this Court sits.

JOHN F. X. MCGOHEY,
U. S. D. J.

February 21, 1957.

A True Copy

HERBERT A. CHARLSON, Clerk,
By EUGENE LIEBER,
Deputy Clerk.
(Seal)

Affidavit of John T. Moran, Jr., in Support of Order for the Issuance of Subpoena

(Record, pages 94-96)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:
SOUTHERN DISTRICT OF NEW YORK }

JOHN T. MORAN, JR., being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Southern District of New York, and as such am fully familiar with the facts in the above-entitled matter.

2. The Attorney General desires the testimony of Alfred K. Stern and Martha Dodd Stern each of whom is a citizen of the United States of America in a criminal proceeding before the January Special Grand Jury for the Southern District of New York on March 14, 1957.

3. Upon information and belief, Alfred K. Stern and Martha Dodd Stern are beyond the jurisdiction of the United States of America, residing in Mexico City, Mexico.

4. Deponent respectfully submits that Title 28, Section 1783, United States Code, authorizes the foreign service sought here.

Affidavit of John T. Moran, Jr., in Support of Order for the Issuance of Subpoena

3. Your deponent further states that the travel and attendance expenses were computed in the following manner:

Attendance expenses for 14 days at the rate of $8.00 per day	$112.00
Witness fee for 10 days travel time and 4 days appearances at the rate of $4.00 per day	56.00
Travel allowance between Mexico City, Mexico and New York City and return (2808 miles at 8¢ a mile)	449.28
Estimated expense of travel to and from transportation termini	10.00
	$627.28

4. Your deponent respectfully submits that Title 28, section 1821, United States Code, authorized in lieu of the mileage allowance, the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage incurred by a witness required to travel to and from the continental United States; that your deponent has been informed by experienced travel counsel for American Express Company that the actual expense of travel by train or by air at first-class rates between Mexico City, Mexico and New York City and return does not exceed $300.00.

5. Total travel and attendance expenses tendered to each witness at the time of service of the subpoena will therefore amount to $468.00.

WHEREFORE deponent prays that subpoenas issue and be sent to any Consul General or Consul of the United States of America within the Republic of Mexico and that

such Consul General or Consul be authorized to serve said subpoenas commanding Alfred K. Stern and Martha Dodd Stern to appear before the January Special Grand Jury for the Southern District of New York on the 14th day of March, 1957, at 10:30 in the forenoon, at the United States Court House, Foley Square, New York City, Room 1401, and that the Court fix the sum of $468.00 as the necessary travel and attendance expenses to be sent with the subpoena and tendered to each such witness at the time of the service of said subpoena.

JOHN T. MORAN, JR.

(Sworn to February 21, 1957.)

* * *

[An identical order, upon an identical affidavit, same dates, with respect to Alfred K. Stern.]

* * *

Subpoena

(Record, page 117)

JTM:GR

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To: MARTHA DODD STERN
Calle Oliver Goldsmith 38
Pelanco, Mexico, D. F.

GREETING:

WE COMMAND YOU that all and singular business and excuses being laid aside, you and each of you appear and attend before the Grand Inquest of the body of the people

Subpoena

of the United States of America for the Southern District of New York, at a District Court, to be held at Room 513 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, in and for the said Southern District of New York, on the 14th day of March 1957, at 10:30 o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of Section 371, Title 18, U. S. Code on the part of the United States, and not to depart the Court without leave thereof, or of the District Attorney.

And this you, or any of you are not to omit, under the penalty upon you and every of you, of Two Hundred and Fifty Dollars.

WITNESS the Honorable John W. Clancy, Judge of the United States District Court at the Borough of Manhattan, in the City of New York, the 21st day of February, in the year of our Lord, One Thousand Nine Hundred and Fifty-seven.

HERBERT A. CHARLSON,
Clerk.

PAUL W. WILLIAMS,
United States Attorney.

Mr. Moran—Rm. 307C

* * *

[An identical subpoena issued on same date, directed to Alfred K. Stern.]

Notice of Motion to Quash Subpoenas and Memo Endorsed Denying Motion

(Record, pages 101-102)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE BUT NAMING BOTH APPELLANTS]

Sir:

PLEASE TAKE NOTICE that upon the annexed affidavit of Paul O'Dwyer, duly sworn to the 6th day of March, 1957, and upon the orders made by Hon. John F. X. McGohey District Judge, herein dated February 21, 1957 and the papers on which said orders were made, and the subpoenas issued pursuant to said orders, the undersigned will move this Court at a Term for the hearing of motions to be held at the United States Court House, Room 318, Foley Square, New York, New York on the 11th day of March, 1957 at 10:30 a. m. of that day or as soon thereafter as counsel can be heard for an order (1) vacating and setting aside said orders of February 21, 1957 and quashing the subpoenas issued thereunder on the ground that said orders and subpoenas were not authorized by law, are illegal, null and void; and (2) pending the determination of this application, extending the return date provided for in said subpoenas until a date ten days after final decision herein.

Dated: March 6, 1957.

PAUL O'DWYER,
Attorney for Alfred K. Stern and
Martha Dodd Stern,
Appearing specially for the purposes of this motion only,
40 Wall Street,
New York 5, New York.

Order to Show Cause and Affidavit

To:

PAUL WILLIAMS, ESQ.,
United States Attorney.

• • •

(Record, page 108A)

[Memo endorsed:]

"Motion denied. The only point raised that merits any discussion has already been adjudicated in this Court. Cf. U. S. v. Leff, S. D. N. Y. C-143-309 (1954).

This is an order. No settlement is necessary.

/s/ THOS. F. MURPHY,
U. S. D. J."

Order to Show Cause and Affidavit

(Record, pages 139-140)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Upon the annexed affidavit of John T. Moran, Jr., Assistant United States Attorney for the Southern District of New York, sworn to the 21st day of March, 1957, and upon all the proceedings heretofore had herein, it is

ORDERED that the Order issued March 14, 1957 by the Honorable Thomas F. Murphy, United States District Judge for the Southern District of New York, upon the

application of William S. Kenney, Special Attorney for the Department of Justice, directing Martha Dodd Stern to show cause before a term of this Court to be held on March 26, 1957, why she should not be punished for contempt for her failure to obey a subpoena of this Court, be, and hereby is amended in the following respects:

1. ORDERED that Martha Dodd Stern, residing in Mexico City, Mexico, show cause before a term of this Court, to be held in Room 318, United States Court House, Foley Square, New York, New York, in the forenoon of April 15, 1957, at the opening of Court on that day, or as soon thereafter as counsel can be heard, why she should not be punished for contempt for her failure to obey a subpoena of this Court, and it is

2. FURTHER ORDERED that the service of a true copy of this Order at least seven days prior to April 15, 1957 by any Consul General or Consul of the United States within the Republic of Mexico or within any country in which the said Martha Dodd Stern may be found, shall be sufficient service.

Dated: New York, N. Y., March 21, 1957.

THOS. F. MURPHY,
U. S. D. J.

A true copy

HERBERT A. CHARLSON, Clerk,
By CATHERINE B. SOLOMONE,
Deputy Clerk.

MAK

Affidavit of John T. Moran, Jr., in Support of Order to Show Cause

(Record, pages 141-142)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

JOHN T. MORAN, JR., being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Southern District of New York and as such am familiar with the facts in the above entitled matter.

2. On March 14, 1957 the Honorable Thomas F. Murphy, United States District Judge for the Southern District of New York, upon the affidavit of William S. Kenney, Special Attorney for the Department of Justice, ordered Martha Dodd Stern, residing in Mexico City, Mexico, to show cause before a term of this Court, to be held in Room 318, United States Court House, Foley Square, New York, New York, in the forenoon of March 26, 1957, at the opening of Court on that day, or as soon thereafter as counsel can be heard, why she should not be punished for contempt for her failure to obey a subpoena of this Court. It was further ordered that the service of a true copy of this order to show cause at least seven days prior to March 26, 1957, by any Consul General or Consul of the United

Affidavit of John T. Moran, Jr., in Support of Order to Show Cause

States, within the Republic of Mexico, or within any country in which the said Martha Dodd Stern may be found, should be sufficient service.

3. The American Consul at Mexico City, Mexico has informed your deponent that he was unable to make service of a copy of the Order to Show Cause dated March 14, 1957, within the time prescribed by said Order.

4. Wherefore, your deponent prays that the Order to Show Cause dated March 14, 1957 be amended in the following respects:

a) That Martha Dodd Stern, residing in Mexico City, Mexico, show cause before a term of this Court, to be held in Room 318, United States Court House, Foley Square, New York, New York, in the forenoon of April 15, 1957, at the opening of Court on that day, or as soon thereafter as counsel can be heard, why she should not be punished for contempt for her failure to obey a subpoena of this Court.

b) That the service of a true copy of this Order at least seven days prior to April 15, 1957, by any Consul General or Consul of the United States within the Republic of Mexico or within any country in which the said Martha Dodd Stern may be found, shall be sufficient service.

5. No previous application for the relief sought herein has been made to the Court.

JOHN T. MORAN, JR.

(Sworn to March 21, 1957.)

Notice of Motion to Vacate Unserved Order and Memo Endorsed

(Record, pages 155-156)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE BUT WITH RESPECT TO *BOTH APPELLANTS*]

Sir:

PLEASE TAKE NOTICE that Alfred K. Stern and Martha Dodd Stern respectively named in the above proceedings appearing specially for the purpose hereinafter set forth will move this Court at a Term thereof to be held in Room 318 United States Court House, Foley Square, New York, New York on May 1, 1957 at 2:00 o'clock on that day or as soon thereafter as counsel can be heard for an order vacating and setting aside the order purportedly made herein by Hon. Thomas F. Murphy District Judge on March 14, 1957 and more particularly vacating, annulling and setting aside the order or provision therein to the effect that any United States Marshal or Deputy Marshal shall levy or seize any of their property within the United States; and annulling or expunging or eliminating from this proceeding the aforementioned order bearing date March 14, 1957 and the affidavit of William S. Kenney annexed to said order sworn to March 14, 1957 upon the grounds that (1) said alleged order and affidavit are not claimed to have been served, and were not served upon them as required by the statutes in such cases made and provided; (2) this Court is without jurisdiction with respect to their persons and/or property; and (3) on all

Notice of Motion to Vacate Unsigned Order and Memo Endorsed

grounds heretofore stated in their special appearance heretofore filed herein.

Dated: New York, New York,
April 25, 1957

ALFRED K. STERN and
MARTHA DODD STERN,
By /s/ PAUL O'DWYER,
their attorney appearing specially for the purposes above stated.

To:

PAUL W. WILLIAMS,
United States Attorney,
United States Court House,
Foley Square,
New York 7, New York.

• • •

(Record, page 158)

[Memo endorsed:]

"Motion denied.

So ordered.

May 1, 1957.

RICHARD M. LEVET,
U. S. D. J."

Opinion

[Proceedings]

Before:

Hon. Richard H. Levet, District Judge.

New York, May 1, 1957

Appearances:

Joseph T. Eddins, Esq., Trial Attorney, Department of Justice, and Paul W. Williams, Esq., United States Attorney, for the Government; by Thomas B. Gilchrist, Jr., Esq., Assistant United States Attorney.

Paul O'Dwyer, Esq., Appearing specially for Witnesses; Paul O'Dwyer, Esq., and Howard N. Meyer, Esq., of Counsel.

• • •

[53] The Court: Very well.

I think I indicated last week when this was heard a tentative determination which I expected to make.

These are companion motions to hold respondents Alfred K. Stern and his wife, Martha Dodd Stern, in contempt by reason of their failure to obey a subpoena to appear and testify before a Grand Jury. The facts are the same in each case.

Both respondents are citizens of the United States but now and for some time have resided in Mexico.

On February 21, 1957, Judge John F. X. McGohey of this Court, upon the affidavit of John T. Moran, Jr., Assistant United States Attorney for the Southern District of New York, which affidavit was sworn to February 21, 1957, ordered that a subpoena issue commanding the said Alfred K. Stern to appear before the January Special Grand

Jury for the Southern District of New York, and, further, that any Consul General or Consul of the United States of America within the Republic of Mexico serve the said subpoena.

Judge McGohey's order also provided the amount to be tendered with the said subpoena for the expenses of Alfred K. Stern in going from and returning to Mexico [54] City and for attendance at the place at which the Court sits.

Mr. Moran's affidavit sets forth the following facts: That the Attorney General desires the testimony of Alfred K. Stern; that Stern and his wife are citizens of the United States; that they were residing in Mexico City, Mexico, and so forth.

A similar order was made with respect to Martha Dodd Stern.

A subpoena was thereafter duly issued and on February 27, 1957, W. John Wilson, Jr., American Consul in Mexico City, served a copy upon Alfred K. Stern, together with the sum of $468, which he accepted.

A similar subpoena was issued and served upon Martha Dodd Stern at the same place, on the same date.

These subpoenas required Alfred K. Stern and Martha Dodd Stern, respectively, to "appear * * * before the Grand Inquest of the body of the People of the United States of America for the Southern District of New York, at a District Court, to be held at Room 1401 in the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, in and for the said Southern District of New York, on the 14th day [55] of March, 1957, at 10:30 o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of Section 371, Title 18, U. S. Code on the part of the United States, and not to depart the Court without leave thereof, or of the District Attorney."

Opinion

On March 14, 1957, the return date of the subpoenas, neither Alfred K. Stern nor Martha Dodd Stern appeared before the Grand Jury. William S. Kenney, Special Attorney of the Department of Justice assigned to this case, so testified before me on April 25, 1957.

On March 6, 1957, by notice of motion returnable before Judge Thomas F. Murphy on March 11, 1957, counsel appearing specially for Alfred K. Stern and Martha Dodd Stern moved to set aside and quash the service of the subpoenas.

After hearings, Judge Murphy denied the motions on March 12, 1957 upon the authority of Judge Noonan's decision of May 28, 1954 in United States of America versus David Neal Leff, Civil Docket No. 143-309.

An appeal was noticed from this determination and a Writ of Prohibition and/or a Writ of Mandamus was sought, but no stay or other relief pending appeal from any final order was granted.

[56] Thereafter, on March 14, 1957, upon an affidavit of William S. Kenney, Special Attorney of the Department of Justice, sworn to March 14, 1957, Judge Murphy signed an order requiring Alfred K. Stern to show cause on March 26, 1957, why he should not be punished for contempt for his failure to obey a subpoena of this Court. The order provided that it was to be served by a Consul General or Consul of the United States of America within the Republic of Mexi o at least seven days prior to March 26, 1957. A simil r order was made regarding respondent Martha Dodd Stern.

On March 21, 1957, on the affidavit of John T. Moran, Jr., Assistant United States Attorney, sworn to March 21, 1957, Judge Murphy amended his orders of March 14, 1957 in the following respects:

It was ordered that the return date of the orders to show cause be April 15, 1957, instead of March 26, 1957,

and that service be made upon Alfred K. Stern and Martha Dodd Stern at least seven days before April 15, 1957.

A copy of the order of March 21, 1957, together with Mr. Moran's affidavit of March 21, 1957, was served upon Alfred K. Stern on April 1, 1957 in Mexico City, by W. John Wilson, Jr., American Consul at Mexico City.

[57] A set of similar papers was served upon Martha Dodd Stern at the same time and place and by the same Consul. No copy of the original orders to show cause of March 14, 1957, was served upon either Alfred K. Stern or Martha Dodd Stern.

On the return date of the motion to punish for contempt, that is, on April 15, 1957, it was adjourned to April 25, 1957, at the request of counsel who appeared specially for the respondents.

At the hearing on April 25th, said counsel for the respondents entered a special appearance on their behalf for the purpose of moving to dismiss or annul this proceeding on the following grounds:

"1. This Court has not obtained and does not have jurisdiction of their person or of this proceeding and is without jurisdiction or power to entertain or proceed herewith;

"2. Title 28, Sections 1783-1784 U. S. C. under which or pursuant to which this proceeding is purportedly being maintained do not authorize or warrant the institution or maintenance of this proceeding; and in so far as said Sections 1783-1784 are attempted to be applied or be deemed applicable against them in this proceeding, it is unconstitutional, in [58] violation of their constitutional rights and liberties and constitutes a denial of due process of law.

"3. The subpoenas referred in the orders to show cause, dated March 21, 1957 for the alleged disobedience of which

this proceeding was instituted were illegal and void, did not constitute lawful mandates of this Court and were not such mandates which they were required to obey and that the alleged orders pursuant to which said subpoenas were and are purportedly issued were and are illegal and void.

"4. An alleged order purportedly issued herein by the Honorable Thomas F. Murphy, District Judge, on March 14, 1957 was never served upon them or either of them and cannot be deemed applicable to a part of this proceeding; and that the orders and subpoenas allegedly served upon them do not support and are not valid, sufficient or proper to give, and do not give this Court jurisdiction in the matter."

The basic validity of the service of the subpoena and any jurisdictional facts relating to the service and validity thereof were determined by Judge Murphy on the motion aforesaid. Judge Murphy based his decision upon Judge Noonan's determination in United States of America versus Leff, supra.

[59] I agree fully with Judge Murphy's decision and with the determination and reasoning set forth by Judge Noonan in the Leff case. Section 1783 of Title 28, United States Code, is sufficient to authorize the service of a valid subpoena under the conditions appearing herein. This question, therefore, in my opinion, has been properly determined and I see no reason why I should conclude differently. Consequently, objections 1, 2 and 3 are not pertinent to this hearing and are overruled.

As to the fourth objection, which was pressed by the attorney who appeared specially for the respondents, it is my opinion that it is of no merit under the circumstances herein. Although Judge Murphy's order of March 14, 1957, was not served upon either of the respondents, his amended order of March 21, 1957 was served upon each respondent.

Opinion

Section 1784 of Title 28, United States Code, with respect to notice, provides:

"(a) A Court of the United States which has issued a subpoena served personally in a foreign country may order the witness who has failed to appear as directed therein to show cause before it at a designated time why he should not be punished for contempt."

[60] The Court had ordered the witnesses to show cause before it at a designated time why they should not be punished for contempt, and the order likewise directs appearance.

The amended order of March 21, 1957, refers to the previous order, the affidavit of Assistant United States Attorney Moran, sworn to March 21, 1957, likewise refers to the previous order; the amended order sets forth the time and place at which the application was to be made and specifies the time of service. Thus there can be no doubt that adequate notice was given since each respondent received notice of the hearing to be held, together with the reason therefor. This, in my opinion, is adequate and sufficient.

The fact that the subpoenas which were served contains a reference to the sum of $250 does not limit the fine to said amount. The statement in the subpoenas is as follows:

"And this you are not to omit, under penalty of two hundred and fifty dollars, and other penalties of the law."

Manifestly, the Court, in its discretion, may impose such additional penalty as may be required [61] under the circumstances.

I will stop at this point before determining the amount of the fine to ask both counsel for the Government and special counsel as to whether anything is to be added in reference to the amount of the fine.

• • •

Order Holding Appellant in Contempt

(Record, pages 160-161)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-[SAME TITLE]

Upon reading the papers filed in this proceeding from which it appears to the satisfaction of the Court that Martha Dodd Stern, being a citizen of the United States of America, residing in the Republic of Mexico, was on the 27th day of February, 1957, duly served in the City of Mexico in the Republic of Mexico with a subpoena issued upon the order of Honorable John F. X. McGohey, United States District Judge for the Southern District of New York, dated February 21, 1957, made pursuant to Section 1783 of Title 28, United States Code, and with a copy of said order, and at the same time and place was tendered and did accept the sum of money specified in said order to cover the expenses of her travel and attendance as a witness, by the terms of which subpoena and order the said Martha Dodd Stern was commanded to appear on the 14th day of March, 1957, before a Grand Jury empanelled for the Southern District of New York, and an order of this Court dated the 21st day of March, 1957, requiring the said Martha Dodd Stern to show cause on the 15th day of April, 1957, why she should not be punished for her failure to obey said subpoena, having been duly served personally upon the said Martha Dodd Stern on April 1, 1957, and the matter having been adjourned to April 25, 1957, at

which time the said Martha Dodd Stern appeared specially by counsel, and a hearing having been held on said date and testimony having been taken from which it appeared to the satisfaction of the Court that the said Martha Dodd Stern had failed to appear before the said Grand Jury at the time and place specified in said subpoena and order, and after due deliberation and upon the proceedings herein, it is

Ordered that in pursuance of Section 1784, Title 28, United States Code, Martha Dodd Stern be and she hereby is adjudged to be in contempt of this Court; and it is further

Ordered that the same Martha Dodd Stern be and she hereby is fined the sum of $25,000.00 to be satisfied, unless paid, pursuant to Section 1784, Title 28, United States Code.

Dated: New York, New York,
May 6, 1957.

Richard H. Levet,
U. S. D. J.

* * *

[An identical order, with identical dates was entered with respect to Alfred K. Stern, Appellant.]

(R. 109)

Subpoena Card for United States Grand Jury (Alfred K. Stern)

(PHOTOPRINT)

[*For convenience of Court and Counsel this document is bound in on the opposite page.*]

[Identical subpoena card left with Martha Dodd Stern.]

United States District Court, Southern District of New York

To ALFRED K. STERN
Calla Oliver Goldsmith
38, Palanco, Mexico D.F.

No. .....

SUBPENA FOR U. S. GRAND JURY

BY VIRTUE OF A WRIT OF SUBPENA, To you directed and herewith shown, YOU ARE COMMANDED and firmly enjoined that, laying all other matters aside, and notwithstanding any excuse, you be and appear in your proper person before the Grand Inquest of the Body of the people of the United States of America, for the Southern District of New York, at a District Court to be held at the U. S. Courthouse, Foley Square, Room ~~535~~ 1401, in the City of New York, in and for the said Southern District, on the 14th day of March, 1957, at 10:30 o'clock in the fore noon of the same day, to testify all and everything which you may know in regard to an alleged violation of Section 371, T.18, U.S.C. on the part of the United States, and not to depart the Court without leave thereof, or of the District Attorney.

AND THIS YOU ARE NOT TO OMIT, under penalty of Two Hundred and Fifty Dollars, and other penalties of the law.

Dated the 21st day of February, 19 57.

By the Court,

PAUL W. WILLIAMS,
United States Attorney.

Mr. Moran - Rm.3070

Note—REPORT AT ROOM ~~535~~ 1401. In order to secure your witness fees and mileage, it is necessary that you shall RETAIN THIS CARD and present same at the United States Attorney's Office, Room 413, upon each day on which you attend court as a witness. FFI ATLANTA—5-7-42—20M—2254

Affidavit of United States Consul, Dated April 2, 1957

(143-147)

United Mexican States
Federal District
City of Mexico
Embassy of the United
States of America
} ss

I, W. John Wilson, Consul of the United States of America in and for the Mexico City Consular District, hereby state under oath that I called at Avenida Paseo de la Reforma No. 104, Office No. 502 at 4:45 p. m. on April 1, 1957 and delivered the attached order to Alfred K. Stern to show cause why he should not be punished for contempt for failure to obey the subpoena of the United States District Court, Southern District of New York.

Dated this second day of April, 1957 at Mexico, D. F.

W. JOHN WILSON JR.

Service No. 3057
Tariff Item No. 58
No Fee Prescribed.

(Seal)

Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter

of

The issuance of a Subpoena upon

ALFRED K. STERN,

a citizen of the United States of America, presently residing in Mexico.

Upon the annexed affidavit of John T. Moran, Jr., Assistant United States Attorney for the Southern District of New York, sworn to the 21st day of March, 1957, and upon all the proceedings heretofore had herein, it is

ORDERED that the Order issued March 14, 1957 by the Honorable Thomas F. Murphy, United States District Judge for the Southern District of New York, upon the application of William S. Kenney, Special Attorney for the Department of Justice, directing Alfred K. Stern to show cause before a term of this Court to be held on March 26, 1957, why he should not be punished for contempt for his failure to obey a subpoena of this Court, be, and hereby is amended in the following respects:

1. ORDERED that Alfred K. Stern, residing in Mexico City, Mexico, show cause before a term of this Court, to be held in Room 318, United States Court House, Foley Square, New York, New York, in the forenoon of April 15,

1957, at the opening of Court on that day, or as soon thereafter as counsel can be heard, why he should not be punished for contempt for his failure to obey a subpoena of this Court, and it is

2. FURTHER ORDERED that the service of a true copy of this Order at least seven days prior to April 15, 1957 by any Consul General or Consul of the United States within the Republic of Mexico or within any country in which the said Alfred K. Stern may be found, shall be sufficient service.

Dated: New York, N. Y., March 21, 1957.

THOS. F. MURPHY
U. S. D. J.

Affidavit of John T. Moran, Jr.

[SAME TITLE]

State of New York,
County of New York,
Southern District of New York—ss.:

JOHN T. MORAN, JR., being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Southern District of New York and as such am familiar with the facts in the above entitled matter.

Affidavit of John T. Moran, J.

2. On March 14, 1957 the Honorable Thomas F. Murphy, United States District Judge for the Southern District of New York, upon the affidavit of William S. Kenney, Special Attorney for the Department of Justice, ordered Alfred K. Stern, residing in Mexico City, Mexico, to show cause before a term of this Court, to be held in Room 318, United States Court House, Foley Square, New York, New York, in the forenoon of March 26, 1957, at the opening of Court on that day, or as soon thereafter as counsel can be heard, why he should not be punished for contempt for his failure to obey a subpoena of this Court. It was further ordered that the service of a true copy of this order to show cause at least seven days prior to March 26, 1957, by any Consul General or Consul of the United States, within the Republic of Mexico, or within any country in which the said Alfred K. Stern may be found, should be sufficient service.

3. The American Consul at Mexico City, Mexico has informed your deponent that he was unable to make service of a copy of the Order to Show Cause dated March 14, 1957, within the time prescribed by said Order.

4. Wherefore, your deponent prays that the Order to Show Cause dated March 14, 1957 be amended in the following respects:

a) That Alfred K. Stern, residing in Mexico City, Mexico, show cause before a term of this Court, to be held in Room 318, United States Court House, Foley Square, New York, New York, in the forenoon of April 15, 1957, at the opening of Court on that day, or as soon thereafter as counsel can be heard, why he should not be

punished for contempt for his failure to obey a subpoena of this Court.

b) That the service of a true copy of this Order at least seven days prior to April 15, 1957, by any Consul General or Consul of the United States within the Republic of Mexico or within any country in which the said Alfred K. Stern may be found, shall be sufficient service.

5. No previous application for the relief sought herein has been made to the Court.

JOHN T. MORAN JR.
John T. Moran, Jr.

(Sworn to March 21, 1957.)

[Identical affidavit regarding service of order on Martha Dodd Stern filed on same day.]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

ALFRED K. STERN and MARTHA DODD STERN,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and Associated Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered February 5, 1958, pursuant to its order of December 5, 1957, which dismissed the Petitioners' appeals from judgments of the District Court for the Southern District of New York adjudging them guilty of contempt and fining each of them $25,000. for disobeying subpoenas served upon them in Mexico for appearance before a Special Grand Jury in New York.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 249 F. 2d 720 and is printed in the Appendix at page 29. The opinion of the District Court is unreported, and is set forth at page 16A of the Appendix to Appellant's Brief in the Court of Appeals filed herewith.

Jurisdiction

The jurisdiction of this Court is based on 28 U. S. C. Section 1254(1). The order of the Court of Appeals dismissing the Petitioners' appeals unless they paid or secured the payment of their fines within sixty (60) days, was entered on December 5, 1957 and made final by order entered on February 5, 1958 . The time to file this petition was extended to May 5, 1958 by order of an Associate Justice of this Court.

Question Presented

Where a citizen of the United States, residing in Mexico, moves unsuccessfully to quash a subpoena served upon him in Mexico to appear and testify before a Special Grand Jury in New York, and is adjudged in contempt of Court for his failure to comply with such subpoena and is fined $25,000., may the Circuit Court of Appeals dismiss his appeal, timely taken and fully perfected, unless he complies with its order that he pay or deposit security for the payment of the fine?

Statutes Involved

In 1926 Congress enacted the Walsh Act (Pub. 483, 69th Cong.; 44 Stat. 835; former 28 U. S. C. §§ 711, 712), which provided, in relevant part:

"WALSH ACT

(Public—No. 483—69th Congress)
(S. 1035)

An Act Relating to Contempts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That whenever letters rogatory shall issue out of any court of the United States, either with or without interrogatories addressed to

any court of any foreign country, to take the testimony of any witness, being a citizen of the United States or domiciled therein, and such witness, having been personally notified by it according to the practice of such court, to appear and testify pursuant to such letters rogatory and such witness shall neglect to appear, or having appeared shall decline, refuse, or neglect to answer to any question which may be propounded to him by or under the authority of such court, to which he would be required to make answer were he being examined before the court issuing such letters, the court out of which said letters issued may upon proper shewing order that a subpoena issue addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

Sec. 2. Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpoena issue, addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated."

In the 1948 Revision and Codification, Sections 711 and 712 of the Walsh Act became Sections 1783 and 1784 of Title 28, U. S. C.:

"1783. SUBPOENA OF WITNESS IN FOREIGN COUNTRY.

(a) A court of the United States may subpoena, for appearance before it, a citizen or resident of the United States who:

(1) Has been personally notified in a foreign country to appear before a court thereof to testify

pursuant to letters regatory issued by such court of the United States, and who has failed to appear or has failed to answer any question which he would be required to answer were he being examined before such court of the United States; or

(2) is beyond the jurisdiction of the United States and whose testimony in a criminal proceeding is desired by the Attorney General.

(b) The subpoena shall designate the time and place for appearance before such court of the United States, and shall issue to any United States consul in such foreign country. The consul shall make personal service of the subpoena and any order to show cause, rule, judgment or decree on the request of the court of the United States or its marshal, and shall make return thereof to such court after tendering to the witness his necessary travel and attendance expenses, which shall be determined by such court and sent with the subpoena.

Sec. 1784. CONTEMPT.

(a) A court of the United States which has issued a subpoena served personally in a foreign country may order the witness who has failed to appear as directed therein to show cause before it at a designated time why he should not be punished for contempt.

(b) If security is given for any damage which the witness might suffer should the charge be dismissed, the court may direct, as a part of such order, that any property of the witness within the United States be levied upon or seized in the manner provided by law or court rules governing levy or seizure under execution, and held to satisfy any judgment that may be rendered against the witness. The security required by this subsection shall not be required of the United States.

(c) The Marshal making such levy or seizure shall forward to any United States counsel within the country where the witness may be a copy of such order and a request that the counsel make personal service of the order on the witness. The marshal shall also cause the order to be published once each

week for six consecutive weeks in some newspaper of general circulation in the district where the court which issued the order sits.

(d) On the return day of such order or any later day to which the hearing may be continued, proof shall be taken. If the charge of recusancy against the witness is sustained, the court may adjudge him guilty of contempt and, notwithstanding any limitation upon the power of the court generally to punish for contempt, may fine him not more than $100,000 and direct that the fine and costs of the proceeding be satisfied unless paid by a sale of the property levied upon or seized, such sale to be conducted upon the notice required and in the manner provided for sales upon execution. Any such judgment rendered upon service by publication only may be opened for answer within one year."

18 U. S. C.:

"Sec. 401. POWER OF COURT.

A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

* * *

3. Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

* * *

Federal Rules of Criminal Procedure:

"Rule 38. STAY OF EXECUTION, AND RELIEF PENDING REVIEW.

(a) Stay of Execution.

* * *

(3) FINE. A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the direct court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

* * *

RULE 54. APPLICATION AND EXCEPTION.

(b) Proceedings.

* * *

(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; * * * or to proceedings against a witness in a foreign country under Title 28, U. S. C. A. 1784."

Statement of the Case

In March 1957 subpoenas commanding the Petitioners to appear and testify before a Special Grand Jury in New York were served on them in Mexico City, Mexico, where they had been residing for several years. The subpoenas contained the admonition "this you, or any of you are not to omit, under the penalty upon you, and every of you, of Two Hundred and Fifty Dollars".

Each of these subpoenas was issued pursuant to an order of Judge McGohey of the District Court for the Southern District of New York, based upon an affidavit of John T. Moran, Jr., an Assistant United States Attorney for the Southern District of New York, asserting: that the Petitioners are citizens of the United States residing in Mexico; that the Attorney General desires their testimony "in a criminal proceeding before the January Special Grand Jury for the Southern District of New York on March 14, 1957" and that the authority for requesting such order and subpoenas was Title 28 U. S. Code Section 1783.

Mr. Moran's affidavit did not specify the particular criminal proceeding referred to in the affidavit, and contained no statement as to the pendency of any particular criminal proceeding or action in any Court of the United States; did not identify the parties to any such criminal action or proceeding; did not identify any defendant, nor did it refer to any criminal action or proceeding pending in any Court before which the Petitioners were to appear and testify nor did it allege or suggest that the Petitioners had or were in possession of any knowledge or information

that was relevant, material or necessary in such criminal action or proceeding.

The Petitioners appeared specially and moved to quash the subpoenas and set aside the orders on grounds, among others: that the subpoenas and orders were unauthorized and void; that no criminal action or proceeding was pending in any Court of the United States in which their testimony was desired; that there was no showing or even claim that the Petitioners or either of them possessed any information or knowledge relevant or necessary to any pending criminal action or proceeding; that the subpoenas did not require them to appear before a Court in any adjudicative proceeding, but before a Grand Jury conducting an investigation; and that the subpoenas were not lawful mandates of the Court which the Petitioners were required to obey.

The motions were denied by Judge Murphy on the eve of the Petitioners' specified appearance, and on the same day, orders were signed returnable March 26, 1957 requiring the Petitioners to show cause why they should not be punished for contempt. These orders and their supporting affidavits were not served upon the Petitioners. They were however served in Mexico with copies of an order signed by Judge Murphy, a week later, purporting to amend the order of March 14th by making the return date of the motion April 15, 1957. The affidavits upon which these amending orders were based, contained no specifications relating to the accusation or grounds of the contempt.

The Petitioners then moved to vacate the orders of March 14th which had not been served on them and to dismiss the proceeding. The Court denied the motions, found the Petitioners guilty of contempt and fined them $25,000. each, to be satisfied by the Marshal out of any of Petitioners' property seized within the United States.

No supersedeas or other stay, in whole or in part, were requested by or granted to the Petitioners.

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MAY 5 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 977

ALFRED K. STERN and MARTHA DODD STERN,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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